MARION COUNTY ASSOCIATION OF DEFENDERS

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April 14, 2025

Chair Nash, Vic-Chair Mandiberg, Members of the Commission:

I am Olcott Thompson, the Executive Director of the Marion County Association of Defenders, the consortium that serves Marion County and handles the majority of appointed cases in Marion County. Paul Lipscomb is one of my predecessors.

There is an overriding political problem about the proposed policy changes that the Commission needs to be very cognizent of. The proposed policy changes do nothing to increase actual attorney capacity and just give critics of OPDC and defense attorneys more ammunition to use against OPDC and defense attorneys.

No matter how much credit the agency gives or does not given to subsequent attorneys on a case it does not do anything about the amount of work the attorneys did and will do. Whether you allow me 100% credit, 90% credit, or 50% credit as the second attorney for a client that has no effect on my actual work. The work will still be done and if the credit is reduced from 100% you will be saying I should be adding more cases even though I have no more actual time to do so than I did when the credit was 100%.

Whether I close a case with a client who is on warrant status after 90 days or 180 days does not increase my actual ability to do work. All that happens when a warrant is issued is I tickle the case for 6 months to see if the client reappeared. The only work on the case is checking eCourt to see if the client did reappear. All that will happen is the time to close a case is decreased to 90 days. Again, all the proposal does is to suggest there is more unused capacity, capacity that does not actually exist and is purely fictional.

The same issues apply with changing the early withdrawal credits. Whatever the credit the work done by the attorney remains the same and changing the credit does not add to or subtract from how much work the attorney can actually do. Any additional capacity is a complete fiction.

A piece of background I am fairly sure the agency has not told the commission: the MAC numbers were created NOT as a number that would reflect the maximum number of cases an attorney should handle but in an effort to show the Legislature then OPDS had sufficient contracted attorneys to handle the projected caseload. OPDS knew what the projected caseload was for the coming bi annum as well as its estimate of the number of attorneys it had under contract and could pay. OPDS then juggled the number of cases per attorney to show the number of attorneys could handle all the projected caseload. Of course, the number of estimated contracted attorneys was larger than the number actual attorneys and the projected number of cases was less than the actual number of cases.

The MAC numbers do NOT reflect any considered assessment as to the maximum number of cases an attorney could/should handle but only an attempt to show the Legislature OPDS had enough attorneys to handle the projected caseload. This is information Ms. Kampfe knows and knew and agreed with at the time these numbers were created.

As I stated at the feedback session and wrote in my written submission after that meeting, tinkering with an unworkable, statutorily prohibited, unconstitutional system of paying private attorneys does not work. The current flat pay system does not work, If you pay the private bar on an hourly basis, both as direct pay and through a consortia, it solves all the problems these proposals try to fix. Paying for the work actually done eliminates how much a credit towards a flat fee should be given at any particular point in the history of a case or who takes over representation when an attorney withdraws.

I have heard there is some push back from the agency about paying attorneys in a consortia on an hourly basis. It can be done and was done for years with MCAD. With this letter is a copy of the proposal MCAD made to OPDC two years ago for an hourly pay contract. Despite an assurance from Executive Director Kampfe that the agency would discuss the proposal with me and my recognition that discussion would probably be needed the only response from the agency as "We don't want to deal with consortia."

Bottom line - do NOT give others more ammunition to shoot at OPDC and defense attorneys. Decreasing the amount of credit given to attorneys for the work they will be doing no matter what only suggests OPDC and defense attorney are not doing the work they agreed to do. That work is being done and the proposals just further devalue that work.

Solve these issues by paying the private bar in the way that meets the requirements of statute and the constitution. Pay hourly.

Olcott Thompson
Executive Director

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April 5, 2022

Jessica Kampfe
Executive Director
Office of Public Defense Services

VIA EMAIL

RE: Request for Hourly Contract

Dear Ms. Kampfe:

The Marion County Association of Defenders (MCAD) requests it return to being paid by the hour for the July 1, 2023 to June 30, 2025, contract. There are multiple ways such a contract can be structured. We have been keeping track of our time over the past two years so putting it into a common time and billing system will not be much of a change.

When MCAD billed OPDS the past we would submit bills for closed cases every other Wednesday. OPDS would pay MCAD the following Wednesday. Before submitting the bills from its members, MCAD would review them to make sure they were accurate and were not too high. If they were a certain percentage above the average the Executive Director would get an explanation from the member who submitted the bill and then allow some, all, or none of the "overage." The member could appeal to a review committee whose decision was final.

We did not review for bills that were to low although in retrospect we should have. We also could not easily see how many hours a member was working in a day, week, month, or any time period. Such a review could only come much later after all cases covering the time period were closed and billed.

MCAD did use a common time and billing system and provided a copy to OPDS. We also billed and were paid for routine expenses. We used the then EEA (now CSS) system for extraordinary (now Case Support) expenses. Everyone billed at the same hourly rate.

This same system could be resurrected using whatever time and billing software OPDS wanted, presumably the same software individual private bar members will be using. A common set of

billing categories can be created based on the ABA study categories. We will be glad to assist in developing the categories. Two categories that should be added because they were not captured in the ABA study are travel time and wait time. Both are vitally important because they are a part of the variance between counties and provide data on how much time could be saved by the court system being more efficient.

MCAD would perform the same type of review it did in the past using whatever amounts OPDS requested. Of course, the issue with this type of structure is the total amount that must be paid is completely unknown and is unknown for years.

A second method is for OPDS to pay MCAD a set amount each month which MCAD uses to pay the member attorneys for their actual billed time. Members would send MCAD a bill of the time they spend on their appointed cases by the fifth of each month for the preceding month. MCAD would perform the same sort of review as it did in the past but the review of time spent would be for the number of hours in the prior month. By the twentieth of the month MCAD would send the bills from its members to OPDS which would have to the fifteenth of the following month to report to MCAD any issues. Those issues would need to be resolved by the end of that month.

The monthly amount to be paid to MCAD would be 1/12 of rates of the MCAD attorneys times the number of hours expected to be worked. We suggest 1648 hours per year which is the DOJ requirement for its lawyers. A full time attorney could work between 1600 and 1800 hours per year (a 10% upward variance) without question. They would only be paid for their actual billed hours however. Anything over 1800 hours would need a review and "permission" from OPDS to be paid.

The total hours for the contract will be the total hours for the two years, 3296. Hours, over or under, after the first year would roll over to the second year of the contract. If watched and managed well the number of hours at the end of the two years should be very close to the 3296 hours unless an attorney had a large trial during the last month of the contract. Year two should also be closer than year one because attorneys will have more experience with this system. MCAD and its members have gotten much better with predicting hours and percentages as we have gained experience under the current contracting model.

The hourly rate could be either a rate per case or a rate per attorney qualifications. The rate would be higher if billing for telephone, photocopying, mileage, parking, and postage routine expenses is eliminated. We request the current "enhanced rates" be the base line rates, higher if the individual private bar attorneys are paid a higher rate. If the mentioned routine expenses are eliminated we request the rates be increased by $10 per hour.

While the rate per case recognizes the skills needed for harder cases it does not recognize those skills except in those harder cases. If a Ballot Measure 11 qualified lawyer handles a lesser felony those skills permit the attorney to resolve the case in fewer hours. If paid the lesser felony rate the attorney is "cheated" because they are skillful. The less skilled lawyer will make more money than the more skilled lawyer. Further, figuring out how much will need to be paid monthly will be a nightmare. It will constantly change and provide no predictability.

We request payment by attorney qualification. This will give OPDS a maximum it will be obligated to pay, the various rates times the maximum of 1800 hours per year. Further certainty is present if the above routine expenses are eliminated and the rates increased by $10 per hour. The total amount that is actually required to be paid does not take years to determine. It is known within three months after the contract is finished. As with the current contract to receive any particular hourly rate the attorney must be qualified to receive the appointments and actually be representing clients who have that type of charge. We are willing to limit attorneys changing the rate they are paid to just one change on July 1, 2024, midway through the contract, rather than as attorneys change qualifications.

This is similar to the system OPDS used to pay individual attorneys with aggravated murder contracts.

Another item that can be added into this is the attorneys must also bill for each client after all their matters are resolved. This gives OPDS a single report of all the tasks and time spend for each client. Alternatively we could be required to keep time by case, rather than client as we do now. This is very hard and it is frequently inaccurate to split time between a client's multiple cases, however.

We are fairly confident that we can perform all the necessary administrative tasks, including those we are doing now that have nothing to do with reporting to OPDS for the present five percent of the overall contract. We will continue to provide training for our members and at least the same level of supervision we now provide. Unfortunately we do not have the funds or the attorneys to provide more supervision than we do now.

A few other pieces. The current speciality courts would also be paid this way rather than using a lump sum or they could continue being paid through a lump sum. When we billed hourly EDP was paid as a lump sum. There were no other speciality courts then.

The open cases as of July 1, 2023, will, necessarily, need to be converted to hourly. The cost information for those cases will not be complete but will provide some information. There should be a significant number of cases open and closed within the two years of the contract to provide good data on what time was spent on what tasks for various types of cases.

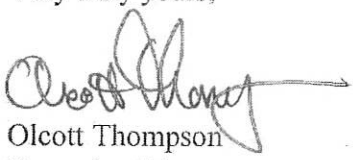
Laura Al Omrani of OPDS was with MCAD when we billed hourly. She may be a possible resource on how the prior system worked.

Our request is we be paid on an hourly basis for actual hours worked starting July 1, 2023. The hourly rate would vary by the qualification of the lawyer. A full time lawyer would commit to 1648 hours a year and could bill up to 1800 hours, or as little at 1600, without getting authorization. We request at a minimum the present "enhanced" rates of $125 to $200 per hour or a higher rate if a higher rate is paid to individually contracted lawyers. We recognize any hourly rate cannot be determined now because OPDS does not know how much money the Legislature will provide. We prefer a $10 per hour increased rate with no billing for the routine expenses set forth above but leave that to OPDS.

We will use the time and billing software OPDS desires and provides and will use it to submit MCAD checked monthly reports and final bills as outlined above with the above reconciliation process. We will assist in creating billing categories and we will review the bills from our members to make sure they comply with the requirements of OPDS.

This will allow a determination of whether properly administered consortia can be paid on an hourly basis. We and OPDS will be able to test out training and actual billing to learn how to do it well for a consortia.

Very truly yours,



Olcott Thompson
Executive Director
MCAD

April 14, 2025

To: Oregon Public Defense Commission
Re: PDO written public comment regarding proposed contract policy revisions

Public Defenders of Oregon (PDO), a nonprofit 501(c)(4), was founded to advocate for nonprofit public defender offices across Oregon. We organized in response to the overwhelming and urgent need to provide sound and sustainable public defense practices, to build and retain a strong public defense workforce, and to center the needs of all people deserving effective and ethical representation.

PDO members have already provided feedback to OPDC in a letter dated February 18, 2025, at a provider feedback meeting on February 27, 2025, and a letter emailed on March 19, 2025. This testimony reiterates and expands upon how these changes will impact the public defense workforce and, in turn, the ongoing crisis in our criminal legal system. It also provides suggested alternatives.

Feedback on Specific Proposals

(1) Reduced Caseloads for First Year Attorneys

Existing contracts set MAC for first year attorneys at 300 misdemeanors–the same as experienced attorneys.
The proposed change would reduce the maximum caseload to 200 for attorneys in their first year.

PDO supports this policy because an attorney in their first year of practice cannot ethically handle 300 misdemeanors; however, the maximum caseload of 200 misdemeanors still exceeds the 2022 Oregon Project, the 2023 National Public Defender Workload Study, the Washington State Bar Association proposed caseload maximums, and the workload model the OPDC State Trial Division has been using since its inception.

Case Type	2022 ABA Oregon Project	2023 RAND National Study	WA State Bar (by 2027)	OPDC MAC
Low-Level Misdemeanor	93	151	120	300
Average Misdemeanor	70	93	120	300
Complex Misdemeanor	56	63	80	300

Low-Level Felony	**52**	**59**	**47**	**165**
Mid-Level Felony	**44**	**36**	**31**	**138**
High-Level Felony	**14**	**21**	**16**	**45**
Serious Sex Assault	**4**	**12**	**9**	**6**
Homicide	**4**	**8**	**7**	**6**
Probation Violation	**250**	**154**		**825**

We would encourage OPDC to adopt a policy that applies to any attorney (whether from Oregon or out-of-state) who has been practicing for three years or less, and is in their first year of public defense practice. The policy should also recognize that no misdemeanor qualified attorney can realistically provide adequate representation on 300 misdemeanors in a year, particularly in trial-heavy jurisdictions, body cam jurisdictions, and those without adequate diversionary programs.

Felony MAC numbers should also be reduced for, at least, attorneys in their second and third years of practice. Many of these attorneys will begin working on low and mid level felonies, and will not have the experience required to handle 165 (low-level) or 138 (mid-level) felonies - the current MAC numbers. This is particularly true because 2nd and 3rd year attorneys enter the new contract cycle (July 1) with a full caseload already. This is one of many fatal flaws of the MAC system and supports the need to move to an open workload model, which is consistent with ORS 151.216(1)(e).

(2) Co-Counsel

Existing contracts provide little guidance on when co-counsel is authorized.
The proposed change would require co-counsel for Murder, Jessica's Law cases, juvenile waiver cases, and any case with a potential life sentence. Co-counsel in other cases could still be approved by OPDC depending on the circumstances. PDO supports these changes. Very serious cases should have two attorneys involved, and also provide training opportunities for attorneys to advance their qualifications.

The concern is that it is unclear whether, under the proposed change, co-counseling attorneys would both receive full MAC credit. To the extent they would not, this would again be concerning because of the potential underestimation of the attorney work performed, especially in serious and complex cases. It would also fail to account for the importance of training and supervision, and the requirement under current standards that attorneys co-counsel certain cases before moving to the next level of qualification.

Another concern is the proposal that even if OPDC has approved co-counsel, "lead counsel or co-counsel need to file a motion for and order to appoint co-counsel with the appropriate court. The court retains final discretion on the appointment of co-counsel." It is highly likely that a court will deny a motion for co-counsel due to the MAC system. This requirement is inconsistent with the ABA *Ten Principles of a Public Defense Delivery System* (revised 2023), principle 1 (Independence): "Public Defense Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers." The Court has no authority to decide co-counsel for retained counsel or the prosecution. The Court does not and should not be given the power to do so for public defense clients only.

An alternative would be to specify that co-counseling attorneys will both receive full credit on any case where OPDC approves counsel. Approval should be automatic in any case that is being co-counseled as a part of an attorney's step towards increasing qualification under ODPC guidelines. A contractor should not have to seek court approval for co-counsel: this is should be an OPDC policy decision.

(3) Partial Weight for Early Withdrawal

Existing contracts already provide partial weighting when an attorney withdraws from a case within the first 30 days.
The proposed change would extend the window within which an attorney receives partial weighting and would only allow credit up to a maximum of 90%.

The concern with this proposal is that it assumes that an attorney has done less work on an early withdrawal case than an average case. This assumption will often be incorrect. The number of hours an attorney spends on a case depends on a number of factors, such as the nature of the charges, the volume of discovery, the complexity of the legal issues, the nature of the attorney-client relationship, the county in which the work is done, and more. The amount of time the lawyer is appointed on the case is only one such factor. Using withdrawal as a proxy for attorney time spent on a given case is unreliable and flawed. The only way to truly account for the amount of work done on each case would be to implement timekeeping and an open workload model. Without that model, it is problematic to make assumptions about attorney time spent on a case by looking at isolated metrics.

An alternative would be to require attorneys to estimate how much time was spent on a case, and assign partial weighting based on that number. This would provide a more accurate accounting of the attorney's work. Attorneys can receive a windfall and more credit than earned

particularly on more serious cases based solely on number of days the case was open. Attorneys can receive less than the credit deserved without consideration of the estimated number of hours actually spent on the case.

OPDC adopted 1578 hours for annual casework per attorney. Based on this number of hours, and the MAC in our contracts, the contract contemplates the following number of hours, per case, per case-type:

- Misdemeanor (300) = 5.25 hours (1578 divided by 300)
- C Fel (165) = 9.56
- A/B Fel (138) = 11.43
- BM11 (45) = 35.07
- Murder/JLaw (6) = 263
- Civil Commitment (230) = 6.86
- PV (825) = 1.91
- Juv Del, non-PCRP (132) = 11.95
- Juv Dep, non-PCRP (69) = 22.87

It is important that none of the above contemplated hours includes time spent on current open cases entering a new contract year. For example, a felony attorney with an open BM11 caseload of 30 cases would not have the hours available to spend 35.07 hours on 45 new appointments in a contract year. Again, this is a fatal flaw with the MAC system, but since the MAC system will continue, there must be efforts to account for time spent on cases. All partial weighting should be based on the contemplated hours in the contract, per case-type. Attorneys should receive the requisite credit based on the estimated number of hours spent on each case. The credit should be proportional regardless of number of days the case was open. Attorneys should also receive time proportionate additional credit (ECC) when the hours they actually worked on the case exceed the number of contemplated hours in the contract.

(4) Second or Subsequent Attorneys

Existing contracts provide full credit for each appointed attorney, regardless of whether they are the second or subsequent attorney.
The proposed change would provide 50% credit for a second or subsequent attorney, if that attorney is within the same firm as the first attorney.
The concern is that this policy again relies on an inaccurate assumption that second or subsequent attorneys are doing less work than they would do on an average case. When a case is

transferred to a new attorney, it is often because of protected leave, resignation or strained relationship between attorney and client. Those types of cases can be extremely time-consuming for attorneys. A number of other factors will also affect how much work the attorney performs on the case, regardless of whether they are the first, second or third attorney. Lastly, the proposed policy highlights contract disparities as hourly attorneys and some consortia will still receive full credit in this situation, and the main impact will be felt by nonprofit offices and law firms.

An alternative, consistent with our request for early termination, would be to require attorneys to estimate how much time was spent on a case, and assign weighting based on that number. Attorneys should receive less, full or more credit based on the actual number of hours worked.

(5) Reducing Vacancy Funding

Existing contracts provide contractors with full funding for vacancies for 60 days.
The proposed change would reduce vacancy funding to 50% for 60 days. The proposal would also allow OPDC to remove the position entirely from the contractor's roster after an additional 30 days.

Several concerns with this policy include that it is extremely difficult to fill a position within 60 days with a qualified candidate, especially in rural counties. To expand the public defense workforce, contractors need more flexibility in hiring, not less. This policy is especially harmful to nonprofit providers, who employ support staff and have overhead that must be paid even when a vacancy exists. This policy also makes budgeting difficult and uncertain, particularly for entities like nonprofits that have stable overhead and support staff costs that do not automatically change with each vacancy. Moreover, this policy exists in the broader context of contractors already being paid unequal wages. The policy would expand that inequity.

Another concern involves the policy component for legally protected leave. It is not justifiable that a contractor "will not receive position related funding" during protected leave. We must maintain the position for any employee on leave and we still have a financial obligation to that employee while on leave. Does OPDC, DOJ, Prosecuting Attorney Offices, the Court, lose their budgeted funding when an employee is on protected leave? We presume the answer is no.

An alternative would be to reduce funding to 50%—which would account for the attorney salary no longer being paid—but extend the time period to 6 months. This would be a much more realistic timeline for filling positions. Vacancy funding could be contingent on the provider describing the recruitment efforts they are undertaking. To incentivize efficient recruitment, and reimburse contractors for the cost of recruiting, OPDC could provide a $10,000 bonus when

positions are filled. This could cover costs associated with recruitment, such as out-of-state recruitment fairs, position advertisement, bar transfer dues, etc.

Finally, consistent with the request for a covenant of good faith and fair dealing described above, this policy should not apply in situations where the vacancy exists because the attorney was hired by the OPDC State Trial Division. Otherwise, the policy results in OPDC penalizing a contractor for a vacancy that OPDC created. OPDC is creating market conditions that make direct employment with OPDC more attractive than nonprofits, despite OPDC also being the funding partner to the nonprofit public defense offices. OPDC's starting salaries for the State Trial Division are substantially higher than those that nonprofit public defense offices are able to provide based on the funding OPDC gives them. These salary disparities undermine nonprofit public defense providers' ability to retain attorneys and fill vacancies. Our understanding is that 11 of the 20 attorneys employed with the OPDC State Trial Division came from nonprofit offices. With the potential expansion of the State Trial Division, we are concerned that more vacancies will be created by the State.

(6) Contract Compliance

Existing contracts contain language regarding contract compliance and enforcement.
The proposed change would provide more details and structure surrounding compliance and enforcement. PDO understands and supports the need for enforcement mechanisms in any contract.

The concern around contract enforcement has always been primarily related to caseloads. The existing contracts state (and must state) that, regardless of MAC, contractors cannot take more cases than they can ethically handle. Any enforcement mechanisms must make clear that a provider cannot be penalized for a case shut-off based on reaching their ethical capacity. Anything else would punish attorneys for upholding their ethical and constitutional obligations. Enforcement should also factor in attrition and turn over. Every time an attorney leaves–for the state trial division, THIP, or a different type of legal work altogether–public defender offices have to recruit and train new attorneys. These attorneys cannot begin taking a full caseload right away. Furthermore, we cannot fill vacancies immediately nor with the same qualification level attorney requiring other attorneys to absorb the cases of those who have left. Taking away resources (funding or attorney positions) from non-profit providers in response to attrition starves the most cost-effective part of the public defense workforce.

An alternative would be to require ongoing dialogue and communication from contractors when they have instituted a shutoff due to ethical capacity, or when their capacity is otherwise reduced.

More broadly, contracts should contain an express covenant of good faith and fair dealing and OPDC should create policies supporting good faith and fair dealing. This should include express provisions that prohibit OPDC from recruiting nonprofit attorneys to the State Trial Division, and prohibiting removal of any FTE position funding from nonprofit public defense providers if an attorney does join an OPDC trial office.

Flexibility Can be Achieved Without Overburdening the Workforce

If OPDC desires more flexibility in the MAC model, particularly for contractors that express a capacity and desire to take on more work, it can do so without the changes proposed thus far. The existing contracts state that a contract may not exceed 115% of MAC without prior approval by OPDC—not that it cannot be exceeded at all. If a contractor reports that they can ethically exceed 115% of MAC, OPDC can simply provide authorization that allows them to do so.

OPDC already does this by authorizing contractors to take hourly cases on top of their contractual obligations. However, that particular practice creates financial incentives that have the potential to harm clients and violates existing law requiring that OPDC not adopt policies that create economic disincentives to providing ethical representation. ORS 151.216(2)(b). Instead, OPDC should require contractors to deliver services under either a contract or hourly billing—not both. Attorneys who truly desire to take more than 100% of their MAC can simply switch to an hourly model. If a provider, under any model, asserts they have ethical capacity to take on more cases, OPDC can simply authorize that contractor to go above 115% MAC. However, this must be done with meaningful review of the attorneys caseload and quality of their work.

None of the specific proposed changes discussed above are necessary to effectuate the goal of increased flexibility with MAC. They will, however, increase the burden on many contractors, particularly the nonprofit providers that serve as the training and recruitment pipeline, and are therefore staffed with newer attorneys who cannot handle as many cases. Reducing MAC to 200 misdemeanors for new attorneys would help address the very real differences between nonprofits and other providers, but the majority of the changes will ultimately result in more burnout and more turnover at our offices.

We urge OPDC to consider the proposed changes in the context of long-term consequences and to understand the harm that will result from continually asking contractors to do more work—particularly when they are already being paid less than OPDC employees and THIP attorneys. This messaging is disheartening to the public defenders that are already working around the clock to serve their clients, and creates an untenable situation that will ultimately increase the number of unrepresented persons in Oregon.

SOUTHWESTERN OREGON PUBLIC DEFENDER SERVICES, INC.

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CASE MANAGER
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Oregon Public Defense Commission
Re: Written public comment regarding proposed contract policy revisions.

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SWOPDS supports this policy and encourages the agency to go even further because an attorney in their first year of practice cannot ethically handle 300 misdemeanors; however, the maximum caseload of 200 misdemeanors still exceeds the 2022 Oregon Project, the 2023 National Public Defender Workload Study, the Washington State Bar Association proposed caseload maximums, and the workload model the OPDC State Trial Division has been using since its inception.

We would like to see OPDC adopt a policy that applies to any attorney (whether from Oregon or out-of-state) who has been practicing for three years or less and is in their first year of public defense practice. The policy should also recognize that no misdemeanor qualified attorney can realistically provide adequate representation on 300 misdemeanors in a year, particularly in trial-heavy jurisdictions, body cam jurisdictions, and those without adequate diversionary programs or like in Coos where multiple unrelated incidents are charged on one District Attorney's information improperly but their general policy is that once motions are filed they will no longer negotiate with us so we have not been filing motions to sever until set for trial. .

Felony MAC numbers should also be reduced for, at least, attorneys in their second and third years of practice. Many of these attorneys will begin working on low and mid-level felonies and will not have the experience required to handle 165 (low-level) or 138 (mid-level) felonies - the current MAC numbers. This is particularly true because 2nd and 3rd year attorneys enter the new contract cycle (July 1) with a full caseload already. This is one of many fatal flaws of the MAC system and supports the need to move to an open workload model, which is consistent with ORS 151.216(1)(e).

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The concern is that it is unclear whether, under the proposed change, co-counseling attorneys would both receive full MAC credit. To the extent they would not, this would again be concerning because of the potential underestimation of the amount of attorney work performed, especially in serious and complex cases. It would also fail to account for the importance of training and supervision, and the requirement under current standards that attorneys co-counsel certain cases before moving to the next level of qualification.

Another concern is the proposal that even if OPDC has approved co-counsel, "lead counsel or co-counsel need to file a motion for and order to appoint co-counsel with the appropriate court. The court retains final discretion on the appointment of co-counsel." It is highly likely that a court will deny a motion for co-counsel due to the MAC system. This requirement is inconsistent with the ABA *Ten Principles of a Public Defense Delivery System* (revised 2023), principle 1 (Independence): "Public Defense Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers." The Court has no authority to decide on co-counsel for retained counsel or the prosecution. The Court does not and should not be given the power to do so for public defense clients only.

An alternative would be to specify that co-counseling attorneys will both receive full credit on any case where OPDC approves counsel. Approval should be automatic in any case that is being co-counseled as a part of an attorney's step towards increasing qualification under ODPC guidelines. A contractor should not have to seek court approval for co-counsel: it should be an OPDC policy decision.

(3) Partial Weight for Early Withdrawal

Existing contracts already provide partial weighting when an attorney withdraws from a case within the first 30 days.
The proposed change would extend the window within which an attorney receives partial weighting and would only allow credit up to a maximum of 90%.

The concern with this proposal is that it assumes that an attorney has done less work on an early withdrawal case than an average case. This assumption will often be incorrect. The number of hours an attorney spends on a case depends multiple factors, such as the nature of the charges, the volume of discovery, the complexity of the legal issues, the nature of the attorney-client relationship, the county in which the work is done, the special needs of the client if any and more. The amount of time the lawyer is appointed on the case is only one factor. Using withdrawal as a proxy for attorney time spent on a given case is unreliable and flawed. The only way to truly account for the work done on each case would be to implement timekeeping and an open workload model.

An alternative would be to require attorneys to estimate how much time was spent on a case, and assign partial weighting based on that number. This would provide a more accurate accounting of the attorney's work. SWOPDS would also recommend that once an attorney has spent the number of hours anticipated by MAC they should get the full credit for that case no matter if they were the first, second or third attorney on the case.

OPDC adopted 1578 hours for annual casework per attorney. Based on this number of hours, and the MAC in our contracts, the contract contemplates the following number of hours, per case, per case-type:

- Misdemeanor (300) = 5.25 hours (1578 divided by 300)
- C Fel (165) = 9.56
- A/B Fel (138) = 11.43
- BM11 (45) = 35.07
- Murder/JLaw (6) = 263
- Civil Commitment (230) = 6.86
- PV (825) = 1.91
- Juv Del, non-PCRP (132) = 11.95
- Juv Dep, non-PCRP (69) = 22.87

(4) Second or Subsequent Attorneys

Existing contracts provide full credit for each appointed attorney, regardless of whether they are the second or subsequent attorney.
The proposed change would provide 50% credit for a second or subsequent attorney, if that attorney is within the same firm as the first attorney.

The concern is that this policy again relies on an inaccurate assumption that second or subsequent attorneys are doing less work than they would do on an average case. When a case is transferred to a new attorney, it is often because of protected leave, resignation or strained relationship between attorney and client. Those types of cases can be extremely time-consuming for attorneys, in many cases they take even more work in order to manage damaged relationships. Many other factors will also affect how much work the attorney performs on the case, regardless of whether they are the first, second or third attorney. Lastly, the proposed policy highlights contract disparities as hourly attorneys and some consortia will still receive full credit in this situation, and the main impact will be felt by nonprofit offices and law firms.

An alternative, consistent with our request for early termination, would be to require attorneys to estimate how much time was spent on a case, and assign weighting based on that number. Attorneys should receive less, full or more credit based on the actual number of hours worked.

(5) Reducing Vacancy Funding

Existing contracts provide contractors with full funding for vacancies for 60 days.
The proposed change would reduce vacancy funding to 50% for 60 days. The proposal would also allow OPDC to remove the position entirely from the contractor's roster after an additional 30 days.

Several concerns with this policy include that it is extremely difficult to fill a position within 60 days with a qualified candidate, especially in rural counties. To expand the public defense workforce, contractors

need more flexibility in hiring, not less. This policy is especially harmful to nonprofit providers, who employ support staff and have overhead that must be paid even when a vacancy exists. This policy also makes budgeting difficult and uncertain, particularly for entities like nonprofits that have stable overhead and support staff costs that do not automatically change with each vacancy. Moreover, this policy exists in the broader context of contractors already being paid unequal wages. The policy would expand that inequity.

Another concern involves the policy component for legally protected leave. It is not justifiable that a contractor "will not receive position related funding" during protected leave. We must maintain the position for any employee on leave and we still have a financial obligation to that employee while on leave. This is particularly difficult for nonprofit offices that have already been struggling and operating in the red for the last several years to be losing further funds when complying with Oregon law.

An alternative would be to reduce funding to 50%, which would account for the attorney salary no longer being paid—but extend the time period to 6 months. This would be a much more realistic timeline for filling positions. Vacancy funding could be contingent on the provider describing the recruitment efforts they are undertaking. To incentivize efficient recruitment, and reimburse contractors for the cost of recruiting, OPDC could provide a $10,000 bonus when positions are filled. This could cover costs associated with recruitment, such as out-of-state recruitment fairs, position advertisement, bar transfer dues, etc.

Finally, consistent with the request for a covenant of good faith and fair dealing described above, this policy should not apply in situations where the vacancy exists because the attorney was hired by the OPDC State Trial Division. Otherwise, the policy results in OPDC penalizing a contractor for a vacancy that OPDC created. OPDC is creating market conditions that make direct employment with OPDC more attractive than nonprofits, despite OPDC also being the funding partner to the nonprofit public defense offices. OPDC's starting salaries for the State Trial Division are substantially higher than those nonprofit public defense offices can provide based on the funding OPDC gives them. These salary disparities undermine nonprofit public defense providers' ability to retain attorneys and fill vacancies. Our understanding is that 11 of the 20 attorneys employed with the OPDC State Trial Division came from nonprofit offices. With the potential expansion of the State Trial Division, we are concerned that more vacancies will be created by the State.

(6) Contract Compliance

Existing contracts contain language regarding contract compliance and enforcement.
The proposed change would provide more details and structure surrounding compliance and enforcement. PDO understands and supports the need for enforcement mechanisms in any contract.

The concern around contract enforcement has always been primarily related to caseloads. The existing contracts state (and must state) that, regardless of MAC, contractors cannot take more cases than they can ethically handle. Any enforcement mechanisms must make clear that a provider cannot be penalized for a case shut-off based on reaching their ethical capacity. Anything else would punish attorneys for upholding their ethical and constitutional obligations. Enforcement should also factor in attrition and turn over. Every time an attorney leaves–for the state trial division, THIP, or a different type of legal work altogether–public defender offices must recruit and train new attorneys. These attorneys cannot begin taking a full caseload right away. Furthermore, we cannot fill vacancies immediately nor with the same qualification level attorney requiring other attorneys to absorb the cases of those who have left. Taking

away resources (funding or attorney positions) from non-profit providers in response to attrition starves the most cost-effective part of the public defense workforce.

An alternative would be to require ongoing dialogue and communication from contractors when they have instituted a shutoff due to ethical capacity, or when their capacity is otherwise reduced. More broadly, contracts should contain an express covenant of good faith and fair dealing and OPDC should create policies supporting good faith and fair dealing. This should include express provisions that prohibit OPDC from recruiting nonprofit attorneys to the State Trial Division, and prohibiting removal of any FTE position funding from nonprofit public defense providers if an attorney does join an OPDC trial office.

Thank you for your time and consideration,
Stacey K. Lowe
OSB #043485

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April 15, 2025

Dear OPDC Commissioners,

I am the Executive Director of Public Defender Services of Lane County. I am also a member of Public Defenders of Oregon (PDO). I write to express my concern regarding the proposed contract changes currently under consideration.

First, I want to pause on a matter of language. As I have heard OPDC debate and discuss these changes in recent weeks, I have heard terms like "increasing capacity" or "recapturing MAC." But the reality is simpler: they *increase caseloads* of contracted public defenders. That is what they are designed to do. As lawyers, we know that language matters. I urge OPDC to talk about these changes in simple terms of increasing public defender caseloads—so that we can all reckon with the reality of what they will do to the attorneys on the front lines. Because those realities matter. Public defenders will have even less time for each client, even more burnout and stress, and will be asked to sacrifice even more time with their families and loved ones in order to do what is already an extremely difficult job.

The increased caseloads that would result from these proposed changes will come with no increase in compensation. As a result, they will cement and further entrench the realities of high caseloads and inadequate pay for public defenders. Oregon has perpetuated this cycle for years—a cycle that has brought us to the present moment, where thousands of Oregonians are without lawyers. Increasing caseloads will only drive that number higher.

I understand that OPDC is limited by the resources it is given and is facing immense pressure to solve the present crisis. But contract terms are fully within OPDC's purview. I would urge OPDC to stand with providers in acknowledging that increasing caseloads cannot and should not be the solution to the crisis we face today. Public defenders show up each and every day to advocate for the rights of Oregon citizens. But in this moment, we need our own advocate. I urge OPDC to be that advocate, and to resist calls to solve a system-wide crisis on the backs of public defenders.

PDO has submitted detailed feedback on each of the proposed changes. I fully support that feedback.

Finally, I ask the commission to consider the effect these changes are likely to have in Lane County specifically. Presently, there is no crisis here. This is primarily because our caseloads—

while still too high—have remained at a relatively manageable level. However, I am certain that will change if and when caseloads increase. When that happens, data tells us we will lose attorneys to stress and burnout. With fewer attoreys, we won't be able to take as many cases—and a crisis will have been created where none previously existed. I am certain this is not OPDC's intent, but it may nonetheless be a consequence of these changes.

I appreciate and understand the incredibly difficult position that OPDC is currently in. And I appreciate the extraordinary effort the commission has put into reforming our system. But I strongly urge the commission not to adopt any contract proposals that increase caseloads for public defenders who are already working around the clock to do their part.

Sincerely,

Caitlin Plummer

Good morning, madam chair and members of the commission. My name is Kevin Neely and I work with the Oregon Criminal Justice Truth Project.

I am here today to again comment on the state of indigent defense representation. When I last testified to this commission, in December, there were over 3,600 on the unrepresented list. Today, there are over 3,900.

At what point will the commission acknowledge that either the caseload limits are a failed approach or, more likely, that implementation of those limits in six key counties is a failed effort?

Please read the article by John Gross, Clinical Associate Professor of Law & Director of the Public Defender Project at University of Wisconsin School of Law. His thorough analysis of the National Public Defense Workload Study is timely and accurate. Not only does he question the methodology, he notes that the findings must be viewed as aspirational, not implementable.

Allow me to paraphrase a telling statement, "I don't think the authors of the report are unaware of the consequences that will follow if public defenders are able to institute the recommended workloads… Without lawyers, cases can't go forward. The criminal legal system will grind to a halt. Legislators won't be able to scale up their indigent defense delivery systems, it would be prohibitively expensive and there just aren't enough attorneys available even if they were willing to spend the money. So, if they can't increase the supply of attorneys, they will have to reduce the demand. That means decriminalization and decarceration."

His point has been half proven. The system is grinding to a halt. Once again, Oregon is a petri dish for criminal justice policy that, in writing, some may find compassionate and aspirational, but in practice, fails the very people it intends to serve. The decriminalization bill, championed by the OCDLA, failed to get out of committee.

With one exception, the proposals you are considering today do very little to end the crisis in our communities and impacts to defendants, victims and the courts. Yes, they merit adoption, in particular the provision allowing for

rigorous enforcement of the contract – a tool we believe is already at the commission's disposal. But elimination of the MAC or a responsible increase for capable attorneys is the only immediate, real solution.